North Dakota Law Review

Volume 68 | Number 1 Article 6

1992

Automobiles: Vehicle Kept for Us of Family: The Family Purpose Doctrine - Just What Is Its Purpose in North Dakota

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AUTOMOBILES: VEHICLE KEPT FOR USE OF FAMILY: THE "FAMILY PURPOSE" DOCTRINE—JUST WHAT IS ITS PURPOSE IN NORTH DAKOTA?

Schobinger v. Ivey, 467 N.W.2d 728 (N.D. 1991).

On October 31, 1988, Tara Mathis was driving Jack Schobinger's car when she was involved in a collision with a vehicle owned and driven by Roland Michael Ivey.[1] As a result of the collision, Schobinger's car incurred extensive damage, while the damage to Ivey's vehicle was negligible.[2] Subsequently, Schobinger brought suit against Ivey to recover for the damage to his car.[3]

The district court determined that Schobinger's stepdaughter, Mathis, and Ivey were both fifty percent negligent and imputed Mathis' negligence to Schobinger by applying the "family purpose" doctrine.[4] The North Dakota Supreme Court affirmed the district court's holding and *held* that the "family purpose" doctrine should be extended to impute the driver's negligence to the owner of the family vehicle for the purpose of limiting the owner's recovery for property damage against a third party tortfeasor.[5]

The "family purpose" doctrine[6] arose as a result of the advent of the motorized automobile in the United States during the early twentieth century.[7] The theory underlying the "family purpose"

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1. Schobinger v. Ivey, 467 N.W.2d 728, 729 (N.D. 1991). Tara Mathis is the stepdaughter of Jack Schobinger. *Id.* The accident occurred in Grand Forks, North Dakota, on second avenue north near the University of North Dakota. Brief of Appellee at 1, Schobinger v. Ivey, 467 N.W.2d 728 (N.D. 1991) (No. 900315) (available at the University of North Dakota Thormodsgard Law Library) [hereinafter Appellee's Brief]. Apparently, an accumulation of moisture from the previous night had formed a thin sheet of ice on areas of the road surface where the accident occurred. *Id.*

2. *Schobinger*, 467 N.W.2d at 729. The repair estimate for Schobinger's vehicle was $1,351.93. Appellees' Brief at 1, *Schobinger* (No. 900315). Schobinger recouped $1,251.93 from his insurance company, Austin Mutual Insurance Company, and the remaining $100 was paid by Mathis. *Id.*

3. *Schobinger*, 467 N.W.2d at 729. At trial, Ivey moved to join Austin Mutual Insurance Company and Tara Mathis as plaintiffs. Appellees' Brief at 2, *Schobinger* (No. 900315). In addition, Schobinger moved to amend his Complaint to reduce his damages by $100. *Id.* The district court denied both of the motions. *Id.*

4. *Schobinger*, 467 N.W.2d at 729. Schobinger appealed the district court's holding to the North Dakota Supreme Court. *Id.*

5. *Id.* at 730. The court employed a "both ways" test, which is discussed *infra* note 69.

6. The "family purpose" doctrine has also been referred to by different authorities as the "family car" doctrine, the "family vehicle" doctrine, and the "family use" doctrine. R.E. Barber, Annotation, *Modern Status of Family Purpose Doctrine with Respect to Motor Vehicles*, 8 A.L.R.3d 1191, 1195 n.2 (1966 & Supp. 1990). For an early article discussing the "family purpose" doctrine, see Edward W. Hope, *The Doctrine of the Family Automobile*, 8 A.B.A. J. 359 (1922).

7. Norman D. Lattin, *Vicarious Liability and the Family Automobile*, 26 MICH. L. REV. 846 (1927-1928). The introduction and increasing use of the automobile in the early twentieth century has caused changes in the general tort law for two primary reasons. G.H.L. Fridman, *The Doctrine of the "Family Car": A Study in Contrasts*, 8 TEX. TECH L. REV. 323 (1976) (comparing the doctrine in the United States, Canada, and England). On

doctrine is that the head of the family furthers his or her business by furnishing a vehicle for the family's pleasure.[8] Accordingly, when a family member uses the vehicle for pleasure, the family member is carrying out the "business" of the owner, thereby becoming the owner's fictional agent or servant.[9] On the basis of this fictional agency relationship, the non-negligent owner is then held vicariously liable for the negligence of the family member.[10]

Conversely, if "strict agency" principles were applied, the owner would not be liable for the family member's negligence while that member operated the automobile for his or her own pleasure.[11] Rather, application of "strict agency" principles would hold the owner liable for the family member's negligence in operating the vehicle only if the family member was functioning as a true agent carrying out the direct or actual business of the owner.[12]

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one hand, some courts went as far as labelling automobiles as "dangerous machines," essentially likening them to "dangerous instrumentalities" because of their weight and ability to travel rapidly. *Id.* at 328-29. On the other hand, other courts took the opinion that the number of cars was the real danger, and thus, as the number increased, the dangers posed by the automobile likewise increased. *Id.* at 329. As a result of submitting to either of these propositions, or both, courts began adapting the law to the peculiar circumstances of the automobile. *Id.*

8. 60A C.J.S. *Motor Vehicles* § 433(1), at 964 (1969). The Tennessee Supreme Court, in a leading case on the "family purpose" doctrine, stated the following:

> The courts of last resort in many states sustain liability upon the theory that the member of the family is upon the [owner's] business, and is his agent for the purpose when driving for pleasure in a car furnished by the father for the pleasure and entertainment of his family. It is said substantially that the father has made it his business to entertain the members of his family when he purchases an automobile for that purpose and delivers it to them for such use.

King v. Smythe, 204 S.W. 296, 297 (Tenn. 1918).

9. *See* Lattin, *supra* note 7, at 846 n.2. The terms "master/servant" and "principal/agent" have been utilized synonymously by courts in the "family purpose" doctrine context. *Id.* However, the master and servant terminology probably better denotes the situation than principal and agent. *Id.* In general, a principal is held responsible for his agent's actions if he has authorized or subsequently ratified them. 3 C.J.S. *Agency* § 390, at 217-18 (1973). A master is liable for his servant's actions when those actions are committed in the servant's course of employment. 57 C.J.S. *Master and Servant* § 555, at 267 (1948).

10. 1 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 4:6, at 554 (1983). As one court noted, the doctrine is indeed "a novel application . . . of the principles of agency . . . ." Hackley v. Robey, 195 S.W. 689, 693 (Va. 1938). Similarly, the Supreme Court of Iowa commented that "the family purpose doctrine [is] a sort of 'kissin cousin' to the doctrine of agency." McMartin v. Saemisch, 116 N.W.2d 491, 494 (Iowa 1962). In general, the doctrine is often referred to as an anomaly in the law. Robert L. Saunders, Note, *Extension of the Family Purpose Doctrine to Motorcycles and Private Property*, 14 WAKE FOREST L. REV. 699, 702-03 (1978). This anomaly results from applying principles of agency to a nonagency situation. *Id.* at 703 n.29.

11. See Lattin, *supra* note 7, at 851.

12. 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 658 (1980). The "family purpose" doctrine is inappropriately referred to when a true agency relationship exists. *Id.* For example, if the family member is driving the vehicle to further the owner's business by chauffeuring the owner around, then an agency relationship exists and reliance upon "family purpose" doctrine is unnecessary. *Id.*

The creation of this fictional agency relationship under the "family purpose" doctrine was dictated by public policy.[13] The doctrine developed to provide parties injured by the negligent operation of an automobile by the owner's child or spouse with a financially responsible person from whom to recover.[14] In the usual case, the child or spouse was financially irresponsible or, in other words, judgment proof, and the injured party was unable to recover.[15] As a result, some states adopted the "family purpose" doctrine to protect the public from these financially irresponsible and negligent drivers.[16]

In 1919, the North Dakota Supreme Court judicially adopted the "family purpose" doctrine in *Ulman v. Lindeman*.[17] The court

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13. 60A C.J.S. *Motor Vehicles* § 433(1), at 962 (1969).

14. Staroba v. Heitkamp, 338 N.W.2d 640, 641-42 (N.D. 1983). Prior to the introduction of the automobile into the American society, the laws concerning principal/agent and master/servant tort liability were generally settled. Fridman, *supra* note 7, at 323. The introduction of the automobile, with its destructive capabilities, created an enormous amount of litigation. Barber, *supra* note 6, at 1195. *See generally* William W. Wilkins, Jr., Note, *The Family Purpose Doctrine*, 18 S.C. L. REV. 638 (1966) (discussing the "family purpose" doctrine). In a leading case on the "family purpose" doctrine, the court noted that the weight of automobiles, coupled with the high rate of speed which they can attain, creates special dangers in populated areas. King v. Smythe, 204 S.W. 296, 298 (Tenn. 1918). In the process of all this added litigation arising from the automobile, modifications in the general standards of liability were adopted by various jurisdictions to accommodate the unique problems posed by the automobile. Barber, *supra* note 6, at 1195-96.

Generally, under the common law, the owner of an automobile is not held liable for negligent operation of the vehicle by a person to whom the owner loans the vehicle, unless that person is an actual agent or employee of the owner. 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 665, at 898 (1980).

One particular modification of the standards which became the subject of much controversy was the "family purpose" doctrine. Barber, *supra* note 6, at 1195.

15. *See* 60A C.J.S. *Motor Vehicles* § 433(1), at 963 (1969).

16. *See id.* § 433(1), at 962-63. However, other states have expressly rejected the doctrine. 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 658, at 893 (1980) (naming Alaska, Arkansas, California, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New York, Ohio, Texas, Utah). Some states, such as Minnesota and Iowa, have adopted owner consent statutes, which have rendered the doctrine obsolete. *Id.* § 665, at 898. The owner consent statutes are broader than the "family purpose" doctrine because liability is imposed on the owner for the negligence of anyone the owner consents to using his or her vehicle, not just members of the family. *Id.* North Dakota has also attempted to protect the public from financially irresponsible minors by statutorily requiring the signature of a parent, guardian, or other responsible adult on the minor's application for a driver's permit or license. *See* N.D. CENT. CODE § 39-06-08 (1989); N.D. CENT. CODE § 39-06-09 (1987).

17. 176 N.W. 25 (N.D. 1919). The court did not use the "family purpose" doctrine terminology, but its language indicated that it was applying the doctrine. *See* Ulman v. Lindeman, 176 N.W. 25, 26 (N.D. 1919). In *Ulman*, the wife of the defendant/owner of the car allowed a friend to drive the family vehicle while the wife and children of the defendant were passengers. *Id.* at 25. The friend was involved in an accident with a third party, who then sued the defendant/owner. *Id.* In holding the defendant/owner liable, the *Ulman* court stated, "If, at the time of the accident, the wife of the defendant were driving the car for the purposes of the owner's business (and the pleasure of the family is a business of the master), the husband would have been liable for its negligent operation." *Id.* at 26. The court thus held that the plaintiff/third party had stated a cause of action and reversed the trial court's demurrer. *Id.* at 27.

The basis for the language in *Ulman* came from a 1918 North Dakota case, Vannett v.

has recognized the doctrine as a fictional agency and a humanitarian doctrine designed for the protection of the public.[18] Generally, for the "family purpose" doctrine to apply in North Dakota, the following elements must be present:

(1) an automobile is maintained or furnished[19] for the pleasure of the family by the head of the family;[20]
(2) the driver is a "family member";[21]
(3) the driver has general authority, either express or implied, or specific authority to drive the car;[22]
(4) the automobile is a "family car";[23] and

Cole, 170 N.W. 663 (N.D. 1918). In this case, Cole's wife was driving the family car when she ran over the plaintiff, who was walking through a cross-walk. *Id.* at 663. Although liability based on the "family purpose" doctrine was not specifically the issue of the case, the court did note, in regard to Mr. Cole's position, that there were "sufficient issuable facts for submission to the jury upon which the defendant E. H. Cole might be charged with liability under the doctrine of respondeat superior." *Id.* at 664.

As is apparent, *Ulman* was an immediate extension of the basic rule of the "family purpose" doctrine in that the owner was held liable for the negligent operation of the vehicle by a third person who was permitted by the owner's wife to drive while she was a passenger in the car. *See Ulman*, 176 N.W. at 25.

18. Michaelsohn v. Smith, 113 N.W.2d 571, 573 (N.D. 1962) (citing Turner v. Hall's Adm'x, 252 S.W.2d 30, 32 (Ky. 1952)). The *Michaelsohn* court also cited a leading case on the doctrine, *King v. Smythe*, stating, " 'We think the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent.' " *Michaelsohn*, 113 N.W.2d at 573 (quoting King v. Smythe, 204 S.W. 296, 298 (Tenn. 1918)).

In Staroba v. Heitkamp, 338 N.W.2d 640 (N.D. 1983), the court expressed the doctrine as follows: "the Family Car Doctrine is that the owner of a vehicle is liable for its negligent operation by one who is using the vehicle with the express or implied consent of the owner for purposes of the business or pleasure of the owner's family." *Id.* at 641.

19. *See* Herman v. Magnuson, 277 N.W.2d 445, 456-58 (N.D. 1979). In North Dakota, the element of furnishing does not hinge upon legal title being in the head of the family. *Id.* at 458. Rather, important considerations of this element include who paid for the car, who had the right to control it, the intent of the parties who bought and sold the car, to whom delivery of the car was made, the understanding between the head of the family and the family member as to who owned the car, and any other evidence that bears on who in fact was the owner. *Id.* at 459.

20. *See* Posey v. Krogh, 259 N.W. 757, 759 (N.D. 1935). The "family purpose" doctrine was held inapplicable where the automobile was owned by an adult daughter who still resided in the family home. *Id.* at 760.

21. *See* Herman v. Magnuson, 277 N.W.2d 445, 459-60 (N.D. 1979). The element of family membership does not hinge upon a blood or marital relationship. *Id.* (citing Bryan v. Schatz, 39 N.W.2d 435, 437 (N.D. 1949)). Minority status is also not determinative of the issue; rather, it should be considered with other circumstances in determining family membership. *Id.* at 460 (citing *Bryan*, 39 N.W.2d at 437).

In *Bryan*, the son had broken relations with the father and moved away from his parents' home. Bryan v. Schatz, 39 N.W.2d 435, 436 (N.D. 1949). The son later started contacting his father and would occasionally visit the family farm. *Id.* On one occasion, the son returned to the farm for a few weeks to help with harvest. *Id.* While staying at his parents' farm, he used his father's automobile and was involved in an accident. *Id.* at 437. The court held that the "family purpose" doctrine was inapplicable because the son was no longer a "family member" within the doctrine's meaning. *Id.* at 437-38.

22. *See* Lauritsen v. Lammers, 161 N.W.2d 804, 810-11 (N.D. 1968); Staroba v. Heitkamp, 338 N.W.2d 640, 641 (N.D. 1983).

23. *See Staroba*, 338 N.W.2d at 643. Although the father intended to give his truck to his son or his son's partnership, the fact that he still retained legal title, control, and other incidents of ownership made the truck a "family car." *Id.* at 644. For a discussion of the

(5) the car is being driven for a purpose for which it was provided.[24]

Since the underlying purpose of the doctrine is to provide recovery for parties injured by financially irresponsible drivers, the doctrine has generally been considered a plaintiff's tool.[25] In *Michaelsohn v. Smith,*[26] however, a defendant attempted to use the "family purpose" doctrine to bar the plaintiff's recovery.[27]

In *Michaelsohn*, the father/owner of a family car sought recovery for damage to his automobile from a third party driver who was involved in an accident with the owner's son.[28] The issue presented was whether the "family purpose" doctrine should apply in the father's action against the other driver so as to impute the negligence of the son to his father.[29] The North Dakota Supreme Court refused to apply the doctrine, noting that the underlying purpose of the doctrine—furnishing a financially responsible person to the injured party—is not served when the doctrine is used to bar the owner's recovery.[30] One year later, the

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extension of the "family purpose" doctrine to cover motorcycles, see Robert L. Saunders, *TORTS — Extension of the Family Purpose Doctrine to Motorcycles and Private Property,* 14 WAKE FOREST L. REV. 699 (1978).

24. *See* Carpenter v. Dunnell, 237 N.W. 779, 780 (N.D. 1931).

25. Barber, *supra* note 6, at 1196.

26. 113 N.W.2d 571 (N.D. 1962).

27. *See* Michaelsohn v. Smith, 113 N.W.2d 571 (N.D. 1962).

28. *Id.* at 572.

29. *Id.*

30. *Id.* at 574. In addition, the court noted the Minnesota and Iowa owner consent statutes and the similar purposes underlying those pieces of legislation, stating as follows:

> The family purpose doctrine and the financial responsibility statutes, such as those of Iowa and Minnesota have their origin in an identical public policy, that of giving an injured party, who is free of negligence, a cause of action against a financially responsible defendant. The doctrine was an extension of previously established rules of liability in order to "advance the dictates of natural justice." Its application, therefore, should only be coextensive with its purpose. To extend the doctrine to deny the right of a non-negligent car owner to recover from a negligent driver of another car would defeat the public policy the doctrine is intended to serve.

Id. The Minnesota owner consent statute provides as follows:

> 170.54. **Driver deemed agent of owner**
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> Whenever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof.

MINN. STAT. ANN. § 170.54 (West 1986).

In construing the foregoing statute, the Minnesota Supreme Court has held that the statute has no application when the owner seeks recovery from the third party. Christensen v. Hennepin Transp. Co., 10 N.W.2d 406, 418-19 (Minn. 1943). Iowa has similarly interpreted its owner consent statute. Stuart v. Piligrim, 74 N.W.2d 212, 216 (Iowa 1956). As has been noted, Minnesota continues to follow this interpretation of its statute. *See* 12 DUNNELL MINN. DIGEST 2D *Motor Vehicles* § 6.28 (3d ed. 1986). Likewise, Iowa appears to maintain its interpretation of its owner consent statute. *See* IOWA CODE ANN. § 321.493 n.30 (West 1985).

court reaffirmed *Michaelsohn* in *Brower v. Stolz*.[31] In *Brower*, the court reiterated that the "family purpose" doctrine has no application when the owner of a family car seeks to recover for damages proximately caused by a third party driver, even when the family member driver has been contributorily negligent.[32] It is significant to note that both of these decisions predated the 1973 adoption of comparative negligence in North Dakota.[33]

Prior to 1973, North Dakota employed the common law doctrine of contributory negligence.[34] Under the doctrine of contributory negligence, a plaintiff who was merely one percent negligent was precluded from recovering for his injuries and damages.[35] As a result of the inequities accompanying the strict doctrine of contributory negligence,[36] states developed devices to overcome these problems.[37] As became apparent, however, these

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31. 121 N.W.2d 624 (N.D. 1963).

32. Brower v. Stolz, 121 N.W.2d 624, 627 (N.D. 1963).

33. *See* N.D. CENT. CODE § 9-10-07 (1987). Section 9-10-07, which became effective on July 1, 1973, provides, in relevant part:

> Contributory negligence does not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence *was not as great as the negligence of the person against whom recovery is sought*, but any damages allowed must be diminished in proportion to the amount of negligence attributable to the person recovering.

N.D. CENT. CODE § 9-10-07 (1987) (emphasis added). North Dakota's statute was derived from Minnesota's comparative negligence statute, which, in turn, was developed from Wisconsin's. Bartels v. City of Williston, 276 N.W.2d 113, 118 (N.D. 1979).

Section 9-10-07 has been suspended by a sunset law that was adopted by the North Dakota Legislature in 1987. *See* 1987 N.D. LAWS ch. 404, § 15. This law is codified at N.D. CENT. CODE § 32-03.2-02 (Supp. 1991). The new section became effective July 8, 1987 and applies only prospectively. *See id.* Additionally, § 15 of chapter 404, S.L. 1987, provides that this law shall be effective from July 8, 1987 through June 30, 1993, and subsequent to that date it is ineffective. 1987 N.D. LAWS, ch. 404, § 15. At the close of this period, § 9-10-07, as it existed prior to the effective date of § 32-03.2-02, shall become effective July 1, 1993. *Id.*

34. *See, e.g.*, Michaelsohn v. Smith, 113 N.W.2d 571 (N.D. 1962); Brower v. Stolz, 121 N.W.2d 624 (N.D. 1963). The origins of the contributory negligence doctrine appear to have stemmed from the 1809 English case Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809). VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 1.2, at 3 (2d ed. 1986). In *Butterfield*, the plaintiff was injured when the horse he was riding ran into a pole the defendant had left in the roadway. HENRY WOODS, COMPARATIVE FAULT § 1:3, at 6 (2d ed. 1987). The court ruled that the plaintiff could not recover under these circumstances, because he had failed to exercise ordinary care by running his horse too fast. *Id.* § 1:3, at 6-7. Thus, the court concluded that the plaintiff could not recover where he had contributed to the happening of the accident. SCHWARTZ, *supra*, § 1.2, at 4. The doctrine expressed in *Butterfield* was first applied in the United States in the Massachusetts case of Smith v. Smith, 19 Mass. 621 (1824). WOODS, *supra*, § 1:3, at 7. In the early part of the twentieth century, however, the doctrine came under sharp criticism because of its harsh results when a plaintiff was only slightly negligent. *Id.* § 1:6, at 12. As a result, various measures were created to limit the harsh outcomes associated with contributory negligence, such as the doctrine of the last clear chance. *Id.* § 1:6, at 11. For a discussion of the last clear chance doctrine, see *infra* note 37.

35. Bartels v. City of Williston, 276 N.W.2d 113, 120 (N.D. 1979).

36. *Id.*

37. *See* WOODS, *supra* note 34, § 1:6, at 11-13. The most important device used to

devices were only a pretext to solving the real villain, the rigid contributory negligence doctrine. Eventually, states began adopting comparative negligence principles both legislatively and judicially;[38] thus, liability began to be apportioned proportionately according to the percentage of fault attributable to each party who contributed to the injury or damage.[39]

North Dakota joined the "march"[40] of states adopting comparative negligence in 1973 by adopting a "modified" form of comparative negligence.[41] Under North Dakota's comparative

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limit the harsh doctrine of contributory negligence was the concept of "last clear chance." *Id.* § 1:7, at 13. Under this concept, the rigid contributory negligence bar on a plaintiff's recovery was held inapplicable if the defendant was determined to have had the "last clear chance" to avoid the accident. *Id.* Other courts avoided the strict contributory negligence doctrine by declining to employ the doctrine if the defendant's actions were "intentional" or "reckless." SCHWARTZ, *supra* note 34, § 1.2(A), at 5.

38. Mark R. Hanson, Comment, *The Unit Rule and North Dakota's Comparative Negligence Statute*, 64 N.D. L. REV. 135, 137-38 (1988).

39. *Id.*

40. Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT. L. REV. 189 (1950). This early article covering the principles of comparative negligence was published when only five American states applied the principles generally in negligence actions. SCHWARTZ, *supra* note 34, § 1.1, at 1.

41. WOODS, *supra* note 34, § 4:3, at 92. In the United States, four primary forms of comparative negligence laws currently exist. *See id.* § 4:1, at 85-87. "Pure" comparative negligence has been adopted both legislatively and judicially by various jurisdictions. *See id.* § 4:2, at 87-90. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2501-2509 (Supp. 1990) (Arizona's legislative adoption of "pure" comparative negligence); Li v. Yellow Cab Co., 532 P.2d 1226, 1242 (Cal. 1975) (in which the California Supreme Court judicially adopted the "pure" form). Under "pure" comparative negligence, a plaintiff can recover regardless of his percentage of fault unless, of course, he is 100% at fault. WOODS, *supra* note 34, § 4:1, at 85. For example, if a plaintiff who has incurred $10,000 worth of damages is 99% negligent, he may still be allowed to recover $100 from the 1% negligent defendant. *Id.* § 4:1, at 85-86.

Another type of comparative negligence is "modified," of which there are two forms. *Id.* § 4:3-4, at 90-93. One form, which North Dakota has employed in its comparative negligence statute, is known as the "not as great as" or "less degree" "modified" comparative negligence form. *Id.* § 4:3, at 90-92. Pursuant to this form, a plaintiff must be less negligent than the person from whom the plaintiff seeks recovery. *Id.* § 4:3, at 91. For the text of North Dakota's comparative negligence statute, see *infra*, note 42. The second form of "modified" comparative negligence allows a plaintiff to recover when his or her negligence equals that of the defendant. *Id.* § 4:4, at 92. This second form of "modified" comparative negligence is usually referred to as the "not greater than" form. SCHWARTZ, *supra* note 34, § 3.5(B), at 70. *See, e.g.*, N.H. REV. STAT. ANN. § 507:7-d (Supp. 1990) (an example of the "not greater than" form). The final form of comparative negligence existing in the United States is called the "slight-gross" system. WOODS, *supra* note 34, § 4:5, at 93. Nebraska has such a form. *Id.* The "slight-gross" form of comparative negligence provides that the plaintiff can recover only if his or her negligence was slight in comparison to gross negligence. *Id.* Once this preliminary determination is made, the plaintiff is allowed to recover; however, the plaintiff's recovery is decreased by the plaintiff's percentage of negligence. *Id.* § 4:5, at 93-94. *See, e.g.*, NEB. REV. STAT. § 25-21,185 (1989) (an example of the "slight-gross" form). The Nebraska statute provides as follows:

> **Actions for injuries to person or property; contributory negligence; comparative negligence.** In all actions brought to recover damages for injuries to a person or to his property caused by the negligence or act or omission giving rise to strict liability in tort of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence or act or omission giving rise to strict liability in tort of the defendant was gross in comparison, but the

negligence statute, a plaintiff may recover from a defendant if the plaintiff's negligence is "not as great as" the negligence of the defendant.[42] Thus, the defense of contributory negligence has not been completely abrogated; rather, the bar on recovery has been shifted from the point of not allowing any negligence on the plaintiff's part to the point of allowing recovery when the plaintiff's negligence is less than the defendant's or the combined negligence of multiple defendants.[43]

Subsequent to the firm establishment of comparative negligence in the American jurisprudence system, various courts have had the opportunity to address the issue of whether the negligence of a family member driver should be imputed to the family vehicle owner in the owner's action against the third party for damage to the vehicle. One such jurisdiction that has answered this question consistently from 1955 up to as recent as 1990 is Nebraska.[44] In *Bartek v. Glasers Provisions Co.*,[45] the Nebraska

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> contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence or act or omission giving rise to strict liability in tort and contributory negligence shall be for the jury.

Id.

42. *See* N.D. CENT. CODE § 32-03.2-02 (Supp. 1991). Section 32-03.2-02 provides, in relevant part:

> **Modified comparative fault.** Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property *unless the fault was as great as the combined fault of all persons who contribute to the injury*, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering.

N.D. CENT. CODE § 32-03.2-02 (Supp. 1991) (emphasis added). Section 32-03.2-02 is a sunset law which replaced § 9-10-07 and will be effective only until June 30, 1993, at which time § 9-10-07 will be reinstated unless the North Dakota legislature takes additional action in the meantime. Hanson, *supra* note 38, at 136 n.6. The language of § 9-10-07 only provides for a case involving a single defendant. *See* N.D. CENT. CODE § 9-10-07. For the text of § 9-10-07, see *supra* note 33.

Thus, by adopting § 32-03.2-02, the North Dakota Legislature instilled two primary changes in the comparative fault law. *See* Hanson, *supra* note 38, at 135 n.3. First of all, § 32-03.2-02 repealed joint and several liability and adopted several liability for multiple tortfeasors. *Id.* Secondly, the new section adopted the unit rule, whereby the contributory negligence of the plaintiff is compared against the combined fault of all parties contributing to the injury. *Id.* For example, under the unit rule if the plaintiff is determined to be 33.33% negligent, and there are two defendants who are each 33.33%, the plaintiff will not be precluded from recovery because his or her percentage of negligence is not as great as the combined negligence of the defendants. *See* N.D. CENT. CODE § 32-03.2-02, *supra*. For a thorough discussion of North Dakota's comparative negligence statute and the unit rule, see Hanson, *supra* note 38.

43. *See* N.D. CENT. CODE § 32-03.2-02 (Supp. 1991). For the text of the statute, see *supra* note 42.

44. *See* Bartek v. Glasers Provisions Co., 71 N.W.2d 466 (Neb. 1955); Paprocki v. Stopak, 330 N.W.2d 475 (Neb. 1983); Looney v. Pickering, 439 N.W.2d 467 (Neb. 1989); Russell v. Luevano, 452 N.W.2d 43 (Neb. 1990).

45. 71 N.W.2d 466 (Neb. 1955).

Supreme Court held that the contributory negligence of the husband/driver could not be imputed to the wife/passenger/owner in her action for *personal injuries* and *property damage* against the other driver.[46]

Likewise, in *Paprocki v. Stopak*,[47] *Looney v. Pickering*,[48] and *Russell v. Luevano*,[49] the Nebraska court reaffirmed its earlier ruling not to impute.[50] In *Looney*, the court noted that the objective of the "family purpose" doctrine and the owner consent statutes must first be determined in order to decide the issue.[51] If the objective of the doctrine or statute is to hold the owner responsible in all respects, then the negligence of the driver may be imputed to the owner.[52] If, however, the theory underlying the doctrine or statute is merely to provide for greater opportunity of recovery for the third party injured by the negligent operation of an automobile by a financially irresponsible driver, then the doctrine or statute should not be construed to impute the negligence of the driver to the owner.[53] The Nebraska Supreme Court then

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46. *Bartek*, 71 N.W.2d at 473. In *Bartek*, the plaintiff was riding as a passenger in a car which she owned but which was being operated by her husband. *Id.* at 470. The car was involved in an accident, and the plaintiff sued the other vehicle's driver for personal injuries she sustained and for property damage to her car. *Id.* at 469-70. The court declined to impute the negligence of the husband to the wife/owner by way of the "family purpose" doctrine, stating as follows:

> The family purpose doctrine does not have for its objective the purpose of defeating a claim for damages by a guest by imputing the negligence of a driver to such guest but rather to impose upon the owner of a car being used for family purposes the responsibility for its operation as a matter of public policy. It has no application here.

Id. at 473.

47. 330 N.W.2d 475 (Neb. 1983). In *Paprocki*, the court made it clear that the rule prohibiting imputation of negligence applied to personal injury cases as well as to property damage suits. *Paprocki*, 330 N.W.2d at 476-77.

48. 439 N.W.2d 467 (Neb. 1989).

49. 452 N.W.2d 43 (Neb. 1990).

50. Paprocki v. Stopak, 330 N.W.2d 475, 477 (Neb. 1983); Looney v. Pickering, 439 N.W.2d 467, 470-71 (Neb. 1989); Russell v. Luevano, 452 N.W.2d 43, 47 (Neb. 1990).

51. *Looney*, 439 N.W.2d at 470. In *Looney*, the owners of a family car sued the driver of another car who was involved in an accident with the owners' son. *Id.* at 469. Again, the court declined to impute the negligence of the son to the owner, by recognizing the objective of the "family purpose" doctrine and stating as follows:

> It is therefore apparent that the rule developed in this state had for its purpose not the making of the owner "responsible in all respects." but, rather, the providing of financial responsibility to third persons injured through the negligence of financially irresponsible automobile drivers. As stated in *Christensen v. Hennepin Transportation Co. Inc.*, 215 Minn. 394, 413, 10 N.W.2d 406, 417 (1943), 'The very reason for holding the consenting owner liable for negligence of the operator of his automobile, that of furnishing financial responsibility to an injured party, is completely absent in the owner's action to recover for damages' done to his car by a negligent third party.

Id. at 470.

52. *Id.* at 470 (quoting RESTATEMENT (SECOND) OF TORTS § 485 cmt. d (1965)).

53. *Id.*

stated that the theory supporting the development of the "family purpose" doctrine fell squarely within the latter reasoning and held the doctrine inapplicable in the context of an owner seeking recovery from a third party for property damage to the owner's vehicle.[54]

As noted above, Minnesota and Iowa have similarly interpreted their owner consent statutes to prohibit the imputation of the driver's negligence to the owner when the owner seeks recovery from the other driver.[55] Connecticut has also statutorily provided that the "family purpose" doctrine will not be applied to impute the negligence of a family car driver to the owner.[56] Also, the highest court in West Virginia decided in 1982 against the imputation of negligence in this context, noting that the use of the "family purpose" doctrine by a defendant to shield himself from liability was inconsistent with the purpose behind the doctrine.[57]

On the other hand, states such as Tennessee and North Carolina have taken positions pointedly in opposition to Nebraska and the other above noted states. For example, North Carolina, which has yet to adopt comparative negligence, treats the family car driver as if he actually is an agent/servant of the owner in all respects, and therefore, pursuant to agency law, North Carolina courts impute the negligence to the owner.[58] Although the Ten-

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54. *Id.*

55. Christensen v. Hennepin Transp. Co., 10 N.W.2d 406, 418-19 (Minn. 1943); Stuart v. Pilgrim, 74 N.W.2d 212, 219 (Iowa 1956). *See supra* note 30.

56. *See* CONN. GEN. STAT. ANN. § 52-572h(m) (West 1991). Section 52-572h(m) provides: "The family car doctrine shall not be applied to impute contributory or comparative negligence pursuant to this section to the owner of any motor vehicle or motor boat." *Id.*

57. Bartz v. Wheat, 285 S.E.2d 894, 896 (W. Va. 1982). After noting that the case was one of first impression, the court concluded that the "better-reasoned approach" to the problem was to prohibit extending the "family purpose" doctrine and limit it to its "traditional use as a plaintiff's rule." *Bartz*, 285 S.E.2d at 895-96. While the court noted that agency principles had been used in the past to describe the workings of the "family purpose" doctrine, the court distinguished the doctrine from agency, stating as follows:

> Under the law of agency, the contributory negligence of an agent would bar recovery by the principal. We note that the purpose of agency law is to make the person who benefits from the agent's actions accountable for his mistakes. There is no such rationale behind the family purpose doctrine. Liability is imputed to the vehicle's owner only as a means of bettering the chances of financial recovery for the plaintiff. While the agency analogy may be helpful in some instances for understanding the family purpose doctrine, we should not feel constrained by agency labels, attached largely for pedagogical reasons, to give the doctrine characteristics which are not necessary to its peculiar role in our law.

Id. at 896 (citation omitted). While *Bartz* does not specifically state that the imputation is curtailed in personal injury cases as well as property damage cases, the opinion does cite Nevada authority which so holds. *Id.* Additionally, a subsequent West Virginia case appears to support the proposition that the prohibition of imputation applies also to personal injury cases. *See* Erie Indem. Co. v. Kerns, 367 S.E.2d 774, 776 (W. Va. 1988).

58. *See* Russell v. Hamlett, 135 S.E.2d 547 (N.C. 1964). The parties stipulated that the

nessee Court of Appeals recognized the weakness of applying a both ways rule in this context, the court opted to preserve uniformity in the law and imputed the negligence of the family driver to the owner.[59]

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driver was a driver of a family purpose automobile. *Id.* at 548. Therefore, the North Carolina Supreme Court, without discussion, found the driver to be a driver of a family purpose automobile and simply declared the driver to be the agent of the owner; therefore, the court held that the agent's contributory negligence would be imputed to the owner. *Id.* at 548-49.

59. Stephens v. Jones, 710 S.W.2d 38, 42-43 (Tenn. Ct. App. 1984). In this case, the plaintiff/mother sued the driver of another vehicle for personal injuries and property damage sustained when the mother was riding in her own car being driven by her daughter. *Id.* at 40. The question presented was whether the trial judge should have instructed the jury on principles that would allow them to impute the contributory negligence of the daughter to the mother. *Id.* In deciding that the trial judge had erred, the court expounded on the issue as follows:

> It is, of course, another matter to impute the *contributory negligence* of the servant to the master as advocated by the Restatement. This exercise in logic has been labeled "the both ways test." The test results in the innocent plaintiff's action against a negligent defendant being barred by the negligence of the plaintiff's servant because the plaintiff would have been responsible for the harm caused by the servant if the plaintiff had been a defendant in the case.
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> We are not unmindful that the both ways test has been criticized because it runs counter to the reason why the rule of vicarious liability was adopted in the first place. In Section 23.6 of Harper & James, the Law of Torts, the authors point out:
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> [T]he seriousness and growth of the automobile problem and the plight of uncompensated accident victims led to increasing pressure for providing for financially responsible defendants. One response to this pressure was the extension of vicarious liability by the court made "family purpose" doctrine . . . This represented a departure from the fault principle so as to impose liability on innocent parties for reasons similar to those leading to workmen's compensation — the owners were better distributors of the risks which their lawful activities created than were their victims.
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> Under these . . . rules expanding vicarious liability beyond the scope of the older law, the question soon arose whether negligence should be imputed to a *plaintiff* on the same new wider basis. Should the bailee's negligence be imputed to his bailor, or the son's to the father, when the bailor or father sues a negligent third person for damage to the automobile? The formal logic to the both ways test would give an affirmative answer, and some courts . . . have imputed the negligence on this basis. But this leads to the paradox that a rule which departed from the common law in response to an urge towards wider liability is being used to curtail liability by expanding the scope of a defense to it. Courts that have perceived this difficulty have reevaluated the both ways test. Some of them have found that it lacks validity in this context wherein it would serve as a vehicle of reaction rather than reform. As the Minnesota court has said, "The very reason for holding the consenting owner liable for negligence of the operator of his automobile, that of furnishing financial responsibility to an injured party, is completely absent in the owner's action to recover for damages" done to his car by a negligent third party.
>
> We realize that by adopting the Restatement position we are adding to an innocent party another burden in addition to the liability imposed by the family purpose doctrine. However, if all we are seeking in this area of the law is a financial reservoir then we should say so directly and impose liability in each case on the party more able to pay it.
>
> On the other hand, so long as we have a rule in our law of agency that the master is liable for the negligence of his servant and a rule in the law of torts that the owner of an automobile is liable for the negligence of the family member driving the automobile for a family purpose, the rules should be applied uniformly.

In *Schobinger v. Ivey*,[60] the North Dakota Supreme Court once again confronted the issue of whether or not the "family purpose" doctrine should apply to impute the negligence of the family member driver to the owner in the owner's suit against the third party driver.[61] The court immediately pointed out that this question had been addressed previously in *Michaelsohn v. Smith*[62] and *Brower v. Stolz*,[63] in which the court declined to apply the "family purpose" doctrine in such a fashion.[64] The court went on to note, however, that these earlier decisions had been made prior to the adoption of comparative negligence in North Dakota.[65]

Id. at 42 (citations omitted) (quoting HARPER & JAMES, THE LAW OF TORTS § 23.6). The *Stephens* opinion gives no specific indication of whether the rule to impute applies in personal injury and property damage cases; however, the broad language used by the court may indicate the rule to impute applies equally in both situations. *See id.* at 42-43 ("[T]he negligence of the daughter would bar any recovery by the mother against the driver of the other automobile.").

60. 467 N.W.2d 728 (N.D. 1991).

61. Schobinger v. Ivey, 467 N.W.2d 728, 729 (N.D. 1991).

62. 113 N.W.2d 571 (N.D. 1962). For a discussion of *Michaelsohn*, see *supra* notes 26-31 and accompanying text.

63. 121 N.W.2d 624 (N.D. 1963). For a discussion of *Brower*, see *supra* notes 32-33 and accompanying text.

64. *Schobinger*, 467 N.W.2d at 729.

65. *Id.* One case that neither the parties nor the court referred to in the determination of the case was Broderson v. Boehm, 253 N.W.2d 864 (N.D. 1977). *See* Schobinger v. Ivey, 467 N.W.2d 728 (N.D. 1991). *Broderson* is a 1977 North Dakota Supreme Court case involving an accident that took place on October 26, 1973. *Broderson*, 253 N.W.2d at 865. Section 9-10-07 of the North Dakota Century Code, which provides for comparative negligence in North Dakota, became effective on July 1, 1973; therefore, the decision of *Broderson* occurred after the adoption of comparative negligence in North Dakota. *See* Bartels v. City of Williston, 276 N.W.2d 113, 122 (N.D. 1979).

In *Broderson*, Pauline Boehm was involved in an accident with another vehicle driven by Ronald Wold. *Broderson*, 253 N.W.2d at 865. Accompanying Mrs. Boehm at the time of the accident were her three daughters, Debra, 12, Kara, 7, and Kami, 6. *Id.* As a result of the accident, Mrs. Boehm and her daughter Debra died from the injuries they sustained. *Id.* An administrator for Debra's estate sued Ronald Wold, Milton Wold (Ronald's father), *Donald Boehm (Debra's father who owned the car driven by Pauline)*, and McKenzie County for the wrongful death of Debra. *Id.* at 866. The court noted that Donald Boehm was only named as a defendant pursuant to the "family purpose" doctrine because he owned the vehicle in which Debra was a passenger. *Id.* at 868. Thus, the issue in the case encompassed whether Donald Boehm, as the heir of Debra, could benefit or recover in a case in which he was a named defendant. *Id.* at 866. While not an issue on the appeal, the North Dakota Supreme Court summarily noted its approval of the trial court's memorandum opinion of January 27, 1976 stating that "imputed negligence under the "family purpose" doctrine was not a bar to Donald Boehm's right of recovery . . . ." *Id.* at 868. The trial court opinion of January 27, 1976, in which the court expressed its approval of the section on imputed negligence under the "family purpose" doctrine, specifically cites *Michaelsohn* and *Brower* for the proposition that the negligence of the family driver should not be imputed to the owner of the car in the owner's suit against a third party. Broderson v. Boehm, Civil No. 3639, 34, 40-41 (5th Dist. Ct. of N.D. Jan. 27, 1976) (located in North Dakota Brief Reports 253 N.W.2d (2)).

Thus, while the facts of *Broderson* may be distinguishable from *Schobinger* due to the damages sought to be recovered in each case, a discussion or mention of *Broderson* is conspicuously absent from the determination in *Schobinger*. This is especially significant, since the *Broderson* case discusses the imputation of negligence under the "family purpose" doctrine after North Dakota had adopted comparative negligence. *See Broderson*, 253 N.W.2d at 868.

The embracement of comparative negligence in North Dakota caused the court to re-examine the issue.[66] The court reasoned that a review was necessary since the harsh result that would occur under the supplanted contributory negligence law—where a plaintiff would be barred from recovery even if the automobile driver was slightly negligent—no longer existed.[67] Although the court noted that the weight of authority went against imputing the family member's negligence in these circumstances, the court stated that "fairness requires that an authorized driver's negligence should be considered in determining the extent of the family vehicle owner's recovery against third parties for damages to the family vehicle."[68] Consequently, the court decided to apply a "both ways" test and concluded that the "family purpose" doctrine should be extended to impute the negligence of a family vehicle driver to the family vehicle owner when the owner seeks recovery for property damages from the third party driver.[69]

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66. *Schobinger*, 467 N.W.2d at 730. The court apparently inadvertently cited the wrong comparative negligence statute in the *Schobinger* opinion. *See* N.D. CENT. CODE § 32-03.2-02, *supra* note 42. The court cited § 9-10-07, the old comparative negligence statute, which has been replaced by the § 32-03.2-02 sunset statute, effective from July 8, 1987 through June 30, 1993. *Schobinger*, 467 N.W.2d at 730. Therefore, since the accident involved in *Schobinger* occurred on October 31, 1988, the appropriate section to apply is § 32-03.2-02. *Cf. Schobinger*, 467 N.W.2d at 729.

67. *Schobinger*, 467 N.W.2d at 730.

68. *Id.*

69. *Id.* Consequently, the court expressly overruled *Michaelsohn* and *Brower* "to the extent that they are inconsistent" with the *Schobinger* opinion. *Id.* The legal concept referred to as the "both ways" test in the realms of vicarious liability was so named by the late Dean Prosser. SCHWARTZ, *supra* note 34, § 16.1, at 252. According to the "both ways" test, if A would be held vicariously liable for the actions of B, then B's contributory negligence will be imputed to A to limit or prevent A's recovery. *Id.* Thus, if B and C are involved in an automobile accident and A (the owner of the car driven by B) brought suit against C for damage to A's car, the contributory negligence of B would be imputed to A. *See* Schobinger v. Ivey, 467 N.W.2d 728 (N.D. 1991).

However, as Schwartz has commented:

> It should be noted that in general tort law there has been considerable dissatisfaction with the "both ways" test. This is because the reasons underlying vicarious liability do not always support the imputation of contributory negligence. For example, in *Weber v. Stokely-Van Camp, Incorporated* the Supreme Court of Minnesota declined to impute a servant's contributory negligence to bar his master's claim for damage to an automobile. The court indicated that a basic reason for vicarious liability of a master is to reach a financially responsible party, and that this does not justify imputing the servant's negligence to bar a master's claim against a third person. The abandonment of the "both ways" test has proceeded apace in Minnesota and has had some minor impact in other states.

SCHWARTZ, *supra* note 34, § 16.1, at 254-55 (footnotes omitted). While in *Schobinger* the North Dakota Supreme Court essentially decided to apply a "both ways" test *because of* the adoption of comparative negligence in North Dakota, Schwartz had previously stated that:

> It should be noted that neither in Minnesota nor in other states has comparative negligence been cited as a reason for or against abandoning the "both ways" rule. The Minnesota decision (*Weber v. Stokely-Van Camp, Inc.*) occurred

Prior to the North Dakota Supreme Court's decision in *Schobinger*, case law in North Dakota supported the proposition that the "family purpose" doctrine could not be employed by a defendant to shield himself from a plaintiff/owner of the family vehicle seeking recovery for damage to his automobile.[70] As a result of the decision in *Schobinger*, the "family purpose" doctrine was extended to allow the negligence of a family driver to be imputed to the owner in the owner's action for property damages.[71] Thus, a family car owner who is an innocent party is saddled with a burden that is in addition to the traditional liability imposed by the workings of the "family purpose" doctrine.[72] The stark implication of combining this new extension of the "family purpose" doctrine with North Dakota's comparative negligence statute yields the outcome that the owner of a family car will be precluded from any recovery for property damage caused by a negligent third party when the percentage of negligence attributable to the driver of the family car is equal to or greater than the negligence of the third party.[73]

A question that remains after *Schobinger* is whether the "family purpose" doctrine would apply in the personal injury context when the owner of the family car is injured as a passenger. Under such circumstances, a court could hold that the driver's negligence be imputed to the owner in the owner's action for *property damages* but not in the owner's action for *personal injuries*.[74] Relying

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before that state adopted comparative negligence. Furthermore, a number of comparative negligence states have continued to apply the "both ways" test. Thus, today, reconsideration and change in the imputing of contributory negligence has taken place independently of comparative negligence. *Nevertheless, a state might find the inception of comparative negligence a stimulus for examining the continued viability of the "both ways" test and whether contributory negligence should continue to be imputed. Comparative negligence is predicated on the general idea that damages should be allocated on the basis of fault; the "both ways" test does not serve that purpose.*

SCHWARTZ, *supra* note 34, § 16.1, at 255 (footnotes omitted) (emphasis added). Consequently, as is apparent, the North Dakota Supreme Court's decision in *Schobinger* to employ a "both ways" test completely contradicts Schwartz's line of reasoning. *Compare* Schobinger v. Ivey, 467 N.W.2d 728, 730 (N.D. 1991) *with* SCHWARTZ, *supra* note 34, § 16.1, at 255 (where Schwartz notes that the adoption of comparative negligence may lead a state to re-examine the "continued viability" of the "both ways" test).

70. *Schobinger*, 467 N.W.2d at 729.

71. *Id.* at 730.

72. *See* Stephens v. Jones, 710 S.W.2d 38, 42 (Tenn. Ct. App. 1984).

73. *See Schobinger*, 467 N.W.2d at 730; N.D. CENT. CODE § 32-03.2-02 (Supp. 1991). If the percentage of negligence attributable to the family car driver is less than the third party's share of the negligence, the owner may recover property damages from the third party according to the third party's percentage of fault. *See* N.D. CENT. CODE § 32-03.2-02 (Supp. 1991).

74. *See Schobinger*, 467 N.W.2d at 730. The *Schobinger* opinion states that "the family purpose doctrine should be extended to impute the driver's negligence to the owner of the family vehicle for purpose of limiting the owner's recovery for *property damage* against a

solely on *Schobinger*, however, it is uncertain whether a personal injury situation would be accorded different treatment in North Dakota.[75]

In essence, the "family purpose" doctrine (which creates a fictional agency) was created for public policy considerations to apply to situations that generally would constitute a bailment-like context.[76] The liability created by the doctrine served to provide financial responsibility for injured third parties.[77] The extension of the doctrine in North Dakota resulting from *Schobinger* clearly does not facilitate the function for which the doctrine was created. The law is not a static creature, but when changes are adopted

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third party tortfeasor." *Id.* (emphasis added). In addition *Schobinger's factual limitation* to property damage claims, various precedents in both North Dakota and Minnesota point to prohibiting imputation in suits by the owner for personal injuries. *See* Broderson v. Boehm, 253 N.W.2d 864 (N.D. 1977); Jasper v. Freitag, 145 N.W.2d 879, 885-86 (N.D. 1966); Weber v. Stokely-Van Camp, Inc., 144 N.W.2d 540, 544-45 (Minn. 1966); Weckerly v. Abear, 256 N.W.2d 79, 81 (Minn. 1977). For a discussion of *Broderson*, see *supra* note 65.

In *Jasper*, the wife/owner of the vehicle sued the third party for personal injuries she sustained when her husband was driving the car. *Jasper*, 145 N.W.2d at 881. The court reversed the lower court's ruling in favor of the defendant, premising the reversal on an erroneous instruction which provided that "there is a presumption, in the absence of any evidence to the contrary, that an owner present in his or her car has the power to control it." *Id.* at 886. In so holding, the court specifically cited with approval the Minnesota case of *Weber v. Stokely-Van Camp, Inc. Id.* at 885-86.

Weber involved a master-servant relationship in which the master incurred personal injuries while he was a passenger in his truck driven by his servant. *Weber*, 144 N.W.2d at 541. Dispensing with the old rule of imputing the servant's negligence to the master to bar the master's action, the Minnesota court criticized the "both ways" test and noted that the reasoning supporting its owner consent statutes did not require imputation in these circumstances. *Id.* at 542-45. The *Weber* court specifically limited its holding to automobile negligence cases. *Id.* at 545.

The scope of the *Weber* decision initially was unclear on the issue of whether the holding applied in personal injury suits as well as suits seeking recovery for property damage. *See id.* Eventually, in 1977, the Minnesota Supreme Court addressed this issue in *Weckerly v. Abear* and held that the negligence of the servant would be imputed to the master in the master's suit against the third party for property damage. *Weckerly*, 256 N.W.2d at 82. Thus, according to Minnesota law concerning master-servant relationship, the negligence of a servant will be imputed to the owner when the owner seeks recovery for property damage; however, the negligence of the servant will not be imputed to the owner in his action for personal injuries. *See id.* at 81-82.

Based on the limited holding in *Schobinger* allowing for imputation only in property damage cases and the above-noted Minnesota case law in the master-servant realm, it is conceivable that the North Dakota Supreme Court will adopt this approach with the "family purpose" doctrine in North Dakota. *See Schobinger*, 467 N.W.2d at 728; *Weber*, 144 N.W.2d at 540; *Weckerly*, 256 N.W.2d at 80.

However, it should be noted at this point that when the owner is in the car, the "family purpose" doctrine may be inapplicable if the driver is a true agent carrying out the direct business of the owner. *See* 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 658 (1980). For a discussion of passenger/owner's rights and liabilities to a third party, see Janet B. Jones, Annotation, *Fact that Passenger in Negligently Operated Motor Vehicle is Owner as Affecting Passenger's Liability to or Rights Against Third Person—Modern Cases*, 37 A.L.R.4th 565 (1985 & Supp. 1991).

75. *See Schobinger*, 467 N.W.2d at 730.

76. Michaelsohn v. Smith, 113 N.W.2d 571, 573 (N.D. 1962). A bailment situation would exist when the bailee is not an agent of the bailor and the bailee has permission to use the bailor's car. *See* Lattin, *supra* note 7, at 850 n.10.

77. *See* Lattin, *supra* note 7, at 850 n.10.

they must be grounded in sound policy.[78] The family purpose doctrine was developed to accommodate public policy in a bailment-type situation, but the *Schobinger* court's unwarranted extension of the doctrine gives a third party who is involved in an accident with a "family purpose" driver a windfall he would not receive had he been involved in an accident with a mere bailee.[79]

As a result of tort reform, states have sought to ground liability according to one's fault. The *Schobinger* decision moves North Dakota away from this goal, while at the same time providing no overriding social policy.[80] This is not to say there is no logical reasoning to support the *Schobinger* court's deviation from prior case law; however, there does not appear to be an overriding policy that dictates the deviation from the 'norm' of general bailment principles. Perhaps the court considered the practical effects of insurance in its effort to balance the scales of "fairness."[81]

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78. Weckerly v. Abear, 256 N.W.2d 79, 81 (Minn. 1977).

79. *See* 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 641 (1980). As has been stated, "Ownership alone is not sufficient to impose liability upon the owner of an automobile because of the negligence of another whom he has permitted to use the automobile." Feather v. Krause, 91 N.W.2d 1, 5 (N.D. 1958) (quoting State v. Thompson, 11 N.W.2d 113, 114 (N.D. 1943)).

80. Comparative negligence is premised on the idea that damages should be apportioned according to fault; hence, applying a "both ways" test (as the North Dakota Supreme Court did in Schobinger) does not logically follow. SCHWARTZ, *supra* note 34, § 16.1, at 255.

81. *See* Brief of Appellee at 1, Schobinger v. Ivey, 467 N.W.2d 728 (N.D. 1991) (No. 900315). In this case, Schobinger had recovered for all of his damages from his insurer, except for his $100 deductible. *Id.*